

Timothy Borders, et al.,
v.
Chelan County; et al.,
v.
Washington State Democratic Central Committee,
Intervenor Respondents,
v.
Libertarian Party of Washington State,
Intervenor Respondents.

Petitioners,

Respondents,

**SECRETARY OF STATE'S
RESPONSE ON WHETHER
OFFSETTING ERRORS ARE
ALLOWED UNDER RCW 29A.68**

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1 The "Petitioners' Motion In Limine To Exclude Evidence Concerning Previously
2 Rejected Ballots And Other Offsetting Errors" raises an important issue of statutory
3 interpretation under our State's election contest statute.

4 This is the Respondent Secretary of State's Response.

5 **I. SUMMARY OF THIS RESPONSE**

6 Subsections .070 & .110 of our State's election contest statute require the petitioner to
7 show that illegal votes and/or election official misconduct changed the outcome of the election.
8 That requires the effect of illegal votes and election official misconduct on both the winner and
9 the second place finisher to be examined.

10 Allowing evidence of illegal votes and election official misconduct that effected the
11 number of lawful votes counted for the runner up (Mr. Rossi), while excluding evidence of
12 illegal votes and election official misconduct that effected the number of lawful votes counted
13 for the winner (Ms. Gregoire), would tell only half the story. The over 1.3 million voters who
14 voted for Mr. Rossi, and the over 1.3 million voters who voted for Ms. Gregoire, deserve the
15 whole story – not half.

16 If the petitioners' true objection is that the Democrats might be planning to introduce
17 evidence of offsetting votes that were not "illegal votes" under our State's election contest
18 statute, or might be planning to introduce evidence of offsetting errors that are not "election
19 official errors" under our State's election contest statute, then the petitioners should make that
20 objection when (if) the Democrats in fact offer that evidence – not preemptively move to
21 interpret our State's election contest statute to prohibit the Democrats from presenting their half
22 of the story concerning the effect of illegal votes and election official errors on the 2004
23 governor's race.

24 The Respondent Secretary of State accordingly requests that the petitioners' motion be
25 denied, and that this Court determine whether specific offsetting votes and errors offered by the
26 Democrats are in fact "illegal votes" or "election official errors" under our State's election

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OFFSETTING ERRORS UNDER OUR STATE'S ELECTION
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1 contest statute by examining the Democrats' full evidence when (and if) the Democrats attempt
2 to introduce it – not by excluding such evidence in a factual vacuum by interpreting our State's
3 election contest statute to prohibit the Democrats from attempting to introduce it at all.

4 **II. DISCUSSION**

5 **A. Our Election Contest Statute Requires The Effect Of Illegal Votes And Election** 6 **Official Errors On Both The Winner And Runner Up To Be Considered.**

7 The Washington election contest statute provision concerning the effect of illegal votes
8 expressly contemplates consideration of both the amount of illegal votes for the winner and the
9 amount of illegal votes for the runner up:

10 **Illegal votes - Number of votes affected - Enough to change result.**

11 No election may be set aside on account of illegal votes, unless it appears
12 that an amount of illegal votes has been given to the person whose right is
13 being contested, that, if taken from that person, would reduce the number
14 of the person's legal votes below the number of votes given to some other
15 person for the same office, after deducting therefrom the illegal votes that
16 may be shown to have been given to the other person.

17 RCW 29A.68.110.

18 The Washington election contest statute provision concerning the effect of election
19 official misconduct similarly requires consideration of whether the first or second place finisher
20 was the person who in fact received the highest number of legal votes:

21 **Misconduct of board - Irregularity material to result.**

22 No irregularity or improper conduct in the proceedings of any election
23 board or any member of the board amounts to such misconduct as to annul
24 or set aside any election unless the irregularity or improper conduct was
25 such as to procure the person whose right to the office may be contested,
26 to be declared duly elected although the person did not receive the highest
number of legal votes.

RCW 29A.68.070.

In short, the provisions of our State's election contest statute require the effect of illegal
votes and election official errors on both the winner and runner up to be considered in order to
fully address which candidate received the largest amount or highest number of lawfully cast
votes. And that makes sense – for allowing a petitioner to simply cherry-pick the illegal votes

1 and errors that favor the petitioners' candidate, without allowing counterbalancing illegal votes
2 and errors to be submitted, would lead to the absurd result of election contests being decided by
3 cherry picking instead of full review.

4 **B. The Petitioners' Four Arguments Do Not Change That Statutory Reality.**

5 The petitioners' *first* argument is that this Court's having dismissed the petitioners'
6 equal protection claims makes the effect of offsetting errors on the winning candidate irrelevant.
7 That is not correct because the fundamental question under our State's election contest statute
8 still remains – i.e., did illegal votes and/or election official errors in fact change which candidate
9 received the largest amount or highest number of lawfully cast votes in the 2004 governor's
10 race.

11 The petitioners' *second* argument invokes the Washington Supreme Court's prior
12 decisions with respect to county canvassing board discretion during this race's recount. But
13 those recount decisions did not rule on – and did not negate – this Court's authority in an
14 election contest after final certification by those canvassing boards.

15 The petitioners' *third* argument based on the Democrats alleged less than forthcoming
16 discovery responses thus far, and the eight petitioners' corresponding claim that they will be
17 prejudice if the Democrats are allowed to tell the other side of this story, overlooks the most
18 important persons in this election contest – namely, the over 1.3 million Washington voters who
19 voted for Mr. Rossi and the over 1.3 million Washington voters who voted for Ms. Gregoire.
20 And as explained earlier, the provisions of our State's election contest statute expressly require
21 the effect of illegal votes and election official errors on both Mr. Rossi and Ms. Gregoire to be
22 considered in order to fully address the petitioners' claim that Ms. Gregoire did not receive the
23 largest amount or highest number of lawfully cast votes.

24 The petitioner's *fourth* argument suggests that it would be “dangerous” and
25 “unworkable” to allow the effect of illegal votes and election official errors on both the winner
26 and runner up to be considered in an election contest. But as explained earlier, that is exactly

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1 what the provisions of the Washington election contest statute require in order to fully address
2 which candidate received the largest amount or highest number of lawfully cast votes. Instead
3 of being dangerous or unworkable, our election contest statute's approach is fair to the millions
4 of Washington voters who voted in our November 2004 election.

5 **III. CONCLUSION**

6 The Respondent Secretary of State believes the above interpretation is the correct
7 interpretation of our State's election contest statute as currently written. The Secretary of State
8 accordingly requests that the petitioners' motion to be denied, and that this Court determine
9 whether specific offsetting votes and errors offered by the Democrats are in fact "illegal votes"
10 or "election official errors" under our State's election contest statute by examining the
11 Democrats' full evidence when (and if) they submit it – not by excluding it in a factual vacuum
12 by interpreting our State's election contest statute to prohibit the Democrats from attempting to
13 introduce offsetting vote or error evidence at all.

14 RESPECTFULLY SUBMITTED this 20th day of April, 2005.

15
16 **ROB McKENNA**
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